

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

WAYNE BERRY,

Plaintiff,

vs.

DEUTSCHE BANK TRUST COMPANY AMERICAS (FKA BANKERS TRUST COMPANY) and JP MORGAN CHASE BANK in their separate capacities and as agents for the pre- and post-petition lenders of Fleming Companies, Inc.; GENERAL ELECTRIC CAPITAL CORPORATION; C&S WHOLESALE GROCERS, INC.; THE POST-CONFIRMATION TRUST OF FLEMING COMPANIES, INC.; ROBERT KORS; CORE-MARK HOLDINGS INC. and DOES 1 to 200

,

Defendants.

Case No. 01:07 CV 7634 (WHP)

ECF Case

AFFIDAVIT OF MICHAEL E. BAUMANN IN SUPPORT OF THE PCT'S AND ROBERT  
KORS' MOTION FOR SUMMARY JUDGMENT

**AFFIDAVIT OF MICHAEL E. BAUMANN**

I, MICHAEL E. BAUMANN, testify as follows:

1. I am a partner at the law firm Kirkland & Ellis LLP. My firm has been retained to represent the Post-Confirmation Trust ("PCT") and Robert Kors in this lawsuit. I have personal knowledge of the facts set forth herein and, if called to testify, could and would testify competently thereto.

2. I am aware that Mr. Berry and Mr. Hogan have alleged that I directed Lex Smith to put Mr. Berry in fear for his personal safety and for the safety of his property at his August 13, 2007 judgment debtor examination, which related to collection actions that C&S Wholesale Grocers and other parties had instituted relating to unpaid attorneys fees they had been awarded in a lawsuit that Mr. Berry filed against them in 2003. This claim is false. I did not direct, or for that matter have the power to direct, Mr. Smith in the representation of his client C&S. I was not present at Mr. Berry's judgment debtor examination. At the time of the judgment debtor examination I was on a plane to Hawaii as I had been scheduled to argue JP Morgan Chase Bank and Deutsche Bank Trust Company Americas' motions to dismiss before the Hawaii District Court the following day, on August 14, 2007.

3. I am also aware that Mr. Berry and Mr. Hogan have alleged that I was in Florida on August 14, 2007 and allegedly waited in the airport to point out Mr. Berry to a process server in Mr. Berry's divorce proceeding with his wife. This claim is false. I was not in Florida on August 14, 2007 or anytime in August of 2007. In fact, as noted above, I had been scheduled to argue JP Morgan Chase Bank and Deutsche Bank Company Americas' motions to dismiss before the Hawaii District Court on August 14, 2007 and flew to Honolulu on August 13, 2007. However, the hearing was cancelled on August 13 while I was in transit to Hawaii. I took the redeye back to Los Angeles that evening, and returned home at approximately 7:30 am on the morning of August 14, 2007. I took a brief nap when I returned home and then worked from home for the remainder of the day to prepare for an evidentiary hearing in Los Angeles Superior Court on August 16. Throughout the day I had frequent contact with my assistant Samantha

Benson and with other attorneys relating to various cases.

4. I did not have any part in hiring a process server in Mrs. Berry's divorce case and no one at my firm did so to my knowledge and I would have known if this was happening. I have never met or spoken to Mrs. Berry. I have never met or spoken to her attorney. And I have never met or spoken to the person who purportedly served Mr. Berry in Florida on August 14, 2007 -- in fact, I don't even know this person's name.

5. I informed Mr. Hogan in writing that the allegations regarding abuse of process in the Second Amended Complaint were without basis in fact and asked that the allegations be withdrawn to avoid the need for the PCT and Mr. Kors to seek sanctions. I also requested Mr. Hogan to explain the basis on which he was making these and other allegations. A true and correct copy of this email exchange is attached as Exhibit A.

6. Mr. Hogan recently attempted to arrange a conference for defense counsel to listen in while he now interviews the person he has identified as the process server who served Mr. Berry in his divorce case. He reports that he has been unable to schedule this conference, however, because the process server refuses to speak to him without Mrs. Berry or her divorce counsel on the line. A true and correct copy of this email exchange is attached as Exhibit B.

So sworn under penalty of perjury under the laws of the United States of America in Los Angeles, California, on February 25, 2008.



Michael E. Baumann

**CALIFORNIA JURAT WITH AFFIANT STATEMENT**

- See Attached Document (Notary to cross out lines 1–6 below)  
 See Statement Below (Lines 1–5 to be completed only by document signer[s], *not* Notary)

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Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California

County of LOS ANGELES

Subscribed and sworn to (or affirmed) before me on this

25th day of FEBRUARY, 2008, by

(1) MICHAEL E. BAUMANN,  
 Name of Signer

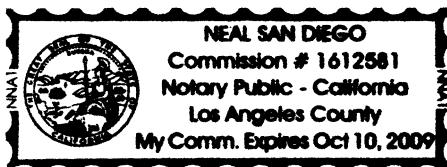
proved to me on the basis of satisfactory evidence  
to be the person who appeared before me (.) (A)

(and)

(2) \_\_\_\_\_,  
 Name of Signer

proved to me on the basis of satisfactory evidence  
to be the person who appeared before me.)

Signature Neal San Diego  
 Signature of Notary Public



Place Notary Seal Above

**OPTIONAL**

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

**Further Description of Any Attached Document**

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

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OF SIGNER #1  
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RIGHT THUMBPRINT  
OF SIGNER #2  
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